

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SARAH A. READY)	
Claimant)	
VS.)	
)	Docket No. 1,040,602
PUPPY PARADE)	
Respondent)	
AND)	
)	
CHARTER OAK FIRE INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the October 27, 2009, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant requests temporary total disability benefits and medical benefits for an alleged May 27, 2008, accident at work. In the October 27, 2009, Order, Judge Barnes found the medical records of Dr. Sandra Barrett, claimant's authorized treating physician, indicated claimant's recent back surgery was causally related to the May 2008 work-related injury. The Judge then granted claimant temporary total disability benefits and medical benefits.

Respondent requests the Board to reverse the October 27, 2009, Order. Respondent contends claimant was released at maximum medical improvement before having emergency back surgery in September 2009. Additionally, respondent argues repetitive duties at claimant's new employment (which began before the September 2009 back surgery) constitute a new and intervening accident and, therefore, respondent is not liable for claimant's treatment. Finally, respondent contends claimant has not presented sufficient evidence to link her May 2008 accident with the September 2009 back surgery.

Claimant maintains she has sustained her burden of proof and asserts there is no evidence to establish that she had an intervening accident. Claimant argues Dr. Barrett related the disc extrusion at L5-S1 (the level involved in the September 2009 back surgery)

to claimant's May 2008 work-related injury. Claimant requests the Board to affirm the October 27, 2009, Order.

The only issue before the Board on this appeal is whether injury arose out of and in the course of the employee's employment with the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant sustained a slip and fall accident while working for respondent on May 27, 2008. Claimant initially sought treatment at Via Christi Regional Medical Center. Respondent sent claimant to Dr. Mark S. Dobyns approximately a week after the accident. Dr. Dobyns recommended physical therapy but insurance refused to pay so claimant did not receive the treatment.

As claimant continued to experience pain, she went to see Dr. Pedro A. Murati at the request of her attorney. Claimant saw Dr. Murati on September 3, 2008, complaining of constant dull ache in her low back and occasional numbness in both feet. Dr. Murati recommended appropriate physical therapy and appropriate medication as needed. Claimant received an impairment rating on December 9, 2008, from Dr. Murati.

Dr. Sandra Barrett, the authorized treating physician, first saw claimant in late April 2009. Dr. Barrett describes claimant's May 27, 2008, injury as disc protrusion at L5-S1 with impingement on the L5-S1 nerve root. Dr. Barrett's records reflect that claimant's condition was managed conservatively with physical therapy and epidural injection. Surgery was discussed but claimant was reluctant to pursue surgery due to her age; she is 26 years old.

Claimant started experiencing extreme pain in late September 2009, which resulted in a visit to the emergency room and emergency back surgery at the L5-S1 level. Dr. Barrett's records reflect that in her medical opinion surgery was appropriate and medically necessary. She also indicates that the disc extrusion leading to the surgery was related to claimant's work injury of May 27, 2008.¹

¹ See P.H. Trans. (Oct. 27, 2009), Cl. Ex. 1 (the September 30, 2009, telephone note from the Kansas Orthopaedic Center). Although this document does not bear Dr. Barrett's name as its author, information contained in the note and in the record leads to the conclusion that more likely than not its author is, and the opinions contained therein are those of, Dr. Barrett.

Claimant no longer works for respondent. From approximately April 29, 2009, through the middle of September 2009, claimant worked for Johnson Controls. Her work at Johnson Controls required her to stand for long periods of time.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the various conditions on which that right depends.² “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”³

The respondent contends that there was a subsequent or intervening event that necessitated claimant’s back surgery. More specifically, respondent argues that claimant’s duties at Johnson Controls constitute a new intervening accident that releases respondent from liability. The respondent’s argument is not persuasive.

Dr. Barrett, the authorized treating physician at the time of the surgery, indicates the medical need for the surgery and further that the need for surgery stems from the injury claimant sustained on May 27, 2008, while employed by the respondent. In addition, claimant’s testimony, which was consistent with Dr. Barrett’s records, was found credible by the Judge and respondent has not presented sufficient evidence to contradict the claimant’s testimony.

The claimant has met her burden of proof.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Judge Barnes dated October 27, 2009, is affirmed.

IT IS SO ORDERED.

² K.S.A. 2007 Supp. 44-501(a).

³ K.S.A. 2007 Supp. 44-508(g).

⁴ K.S.A. 44-534a.

Dated this ____ day of January, 2010.

CAROL L. FOREMAN
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge